JOBNAME: No Job Name PAGE: 1 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

Bina Jaya Mantap Sdn Bhd v Institute of Technology Petronas Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS NO 24C-4–08 OF 2013
MARY LIM J
4 FEBRUARY 2014

Civil Procedure — Injunction — Injunction to restrain — Injunction to restrain calling of bank guarantee payment — Breach of construction agreement — Unconscionable conduct by beneficiary proven — Whether strong prima facie case for injunction made out

Contract — Guarantee — Bank guarantee — Injunction to restrain calling of bank guarantee payment — Breach of construction agreement — Unconscionable conduct by beneficiary proven — Whether strong prima facie case for injunction made out

The defendant had appointed the plaintiff as a contractor to execute certain construction works ('the project'). As required under the terms of the contract, the plaintiff provided a bank guarantee for the sum of RM3.7m. One En Hilme together with other consultants of the defendant were the defendant's representatives in the project. The plaintiff alleged that from the early days of execution of the contract, the defendant breached the contract through its representatives' misconduct and antagonising treatment of the plaintiff. Such misconduct and antagonising treatment were alleged to have frustrated the plaintiff's efforts in execution of the contract. The defendant's representatives were alleged to have interfered with subcontractors; matters relating to site clearance and removal of trees at the work site; changes in the platform level and the location of a borrow pit; and construction of additional or temporary drains. The representatives were also alleged to have made threats during meetings. One of the defendant's consultant was said to have requested the plaintiff for a bribe. A complaint was lodged with the Malaysian Anti-Corruption Commission on this. Hence, the plaintiff issued to the defendant a letter of termination of contract dated 28 May 2013. The plaintiff construed the actions and conduct of the defendant's representatives as a fundamental breach of the contract. The plaintiff treated the breach as a repudiation of the contract which it accepted. Following that, the plaintiff demobilised its labour, machinery and equipment etc from the worksite. By letter dated 30 May 2013 the plaintiff demanded the return of the original bank guarantee. The defendant denied the plaintiff's allegations and alleged that the plaintiff who was already in delay, simply wanted to exit the contract

JOBNAME: No Job Name PAGE: 2 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

as it knew that it was incapable of fulfilling its contractual obligations. The parties agreed to refer the dispute to arbitration. Pending arbitration, the plaintiff made the present application under s 11 of the Arbitration Act 2005 for an injunction to restrain the defendant from demanding and/or realising the bank guarantee.

Held, allowing the application with costs:

(1) Whether the injunctive relief is sought against the issuer or bank or against the beneficiary of the guarantee or bond, such relief is available upon proof of the presence of fraud or unconscionability (see para 57).

(2) There was no evidence whatsoever of the defendant attempting to work with the plaintiff in getting to the root of the plaintiff's problems. Upon learning of the plaintiff's termination of the contract and its reasons for doing so, the defendant instead commenced a course of conduct which then afforded the defendant the opportunity of ultimately, calling on the bank guarantee. This course of conduct and the various actions taken by the defendant lent weight to the plaintiff's contention that it was unconscionable for the defendant to have called upon the bank guarantee in the circumstances of the case (see para 92).

(3) There was a lingering doubt of the events, differences, and disputes between the parties; and the truth of the same. Although those events, differences and disputes formed the subject matter of arbitration and were to be resolved by arbitration as to its merits, that lingering doubt was enough to prick the conscience of a reasonable and sensible man as to the conscionability of the defendant's call on the bank guarantee (see para 95).

(4) Not only a strong prima facie case for injunction had been made out; the court was satisfied that this was an exceptional and suitable case for an injunction to be granted (see para 98).

[Bahasa Malaysia summary

Defendan telah melantik plaintif sebagai kontraktor untuk menyiapkan kerja-kerja pembinaan tertentu ('projek'). Sebagaimana yang dikehendaki di bawah terma-terma kontrak, plaintif telah memberikan jaminan bank untuk jumlah sebanyak RM3.7 juta. En Hilme bersama-sama dengan perunding-perunding lain bagi defendan adalah wakil defendan di dalam projek. Plaintif mendakwa bahawa dari permulaan pelaksanaan kontrak, defendan telah melanggar kontrak melalui salah laku dan pelakuan wakil-wakilnya yang menimbulkan kemarahan kepada plaintif. Salah laku dan tindakan menentang dikatakan telah mengecewakan usaha-usaha plaintif dalam pelaksanaan kontrak. Wakil-wakil defendan didakwa telah campur tangan dengan subkontraktor; perkara berkaitan dengan pembersihan tapak dan pemugaran pokok-pokok di tapak kerja; perubahan pada aras platform

JOBNAME: No Job Name PAGE: 3 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

dan lokasi lubang tanah pinjam; dan pembinaan tambahan atau saliran sementara. Wakil-wakilnya juga didakwa telah membuat ugutan sewaktu mesyuarat. Salah seorang perunding defendan dikatakan telah meminta rasuah daripada plaintif. Aduan telah dikemukakan di Suruhanjaya Pencegahan Rasuah Malaysia tentang perkara itu. Maka, plaintif telah mengeluarkan kepada plaintif satu surat penamatan kontrak bertarikh 28 Mei 2013. Plaintif mentafsirkan tindakan dan kelakuan wakil-wakil defendan sebagai dasar pelanggaran kontrak. Plaintif menggangap pelanggaran sebagai pelepasan kontrak yang mana diterimanya. Berikutan itu, plaintif memberhentikan buruh, jentera dan peralatan dan sebagainya dari tapak kerja. Melalui surat bertarikh 30 Mei 2013 plaintif menuntut kembali jaminan bank asal. Defendan menafikan dakwaan plaintif dan mendakwa bahawa plaintif yang telah terlewat, hanya mahu keluar daripada kontrak kerana ia tahu bahawa ia tidak boleh untuk memenuhi tangunggjawab kontraktualnya. Pihak-pihak bersetuju untuk merujuk pertikaian ke timbang tara. Timbang tara yang belum selesai, plaintif membuat permohonan di bawah s 11 Akta Timbang Tara 2005 untuk suatu injunksi untuk menghalang defendan daripada menuntut dan/atau merealisasikan jaminan bank.

Diputuskan, membenarkan permohonan dengan kos:

(1) Sama ada relief injunksi diminta terhadap pengeluar atau bank atau terhadap benefisiari kepada jaminan atau bon, relief itu boleh diperolehi berdasarkan bukti terdapatnya fraud atau ketidakwajaran (lihat perenggan 57).

(2) Tiada keterangan apapun defendan cuba untuk bekerja dengan plaintif untuk mengetahui punca masalah plaintif. Apabila mendapati penamatan kontrak oleh plaintif dan alasannya berbuat demikian, defendan sebaliknya memulakan kausa tindakan yang mana kemudiannya memberikan defendan peluang, mendapatkan jaminan bank. perlakuan dan pelbagai tindakan yang diambil oleh defendan memberikan beban kepada dakwaan plaintif bahawa ia adalah tidak berpatutan untuk defendan untuk mendapatkan jaminan bank dalam keadaan kes tersebut (lihat perenggan 92).

(3) Terdapat keraguan terhadap peristiwa, perbezaan, dan pertikaian antara pihak-pihak; dan kebenaran yang sama. Walaupun kejadian-kejadian tersebut itu, perbezaan dan pertikaian membentuk subjek perkara timbang tara dan diselesaikan melalui timbang tara untuk meritnya, keraguan yang masih ada sudah cukup untuk mencucuk hati nurani manusia yang munasabah dan masuk akal tentang nurani defendan untuk mendapatkan jaminan bank (lihat perenggan 95).

(4) Bukan sahaja kes prima facie yang kukuh untuk injunksi telah dibuat; mahkamah berpuas hati bahawa ini adalah kes khas dan sesuai untuk injunksi dibenarkan (lihat perenggan 98).]

JOBNAME: No Job Name PAGE: 4 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

Notes

For a case on bank guarantee, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) para 4862.

For cases on injunction to restrain, see 2(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3719–3810.

Cases referred to

Bocotra Construction Pte Ltd & Ors v Attorney General (No 2) [1995] 2 SLR 733, CA (refd)

Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159, CA (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149, SC (refd)

Focal Asia Sdn Bhd & Anor v Raja Noraini bt Raja Datuk Nong Chik & Anor [2009] MLJU 1688; [2009] 1 LNS 913, HC (refd)

GHL Pte Ltd v Unitrack Building Construction Pte Ltd [1999] 4 SLR 604, CA (refd)

Harbottle v National Westminster Bank [1978] QB 146, QBD (refd)

IE Contractors Ltd v Lloyd's Bank plc and Rafidain Bank [1990] 2 Lloyd's Rep 496, CA (refd)

Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd [2011] 7 CLJ 442, CA (refd)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 10, 11

Thakurdas Naraindas (Teoh Bi Shan and Kelvin Ng Chun Yee with him) (Vin & Issac Lee) for the appellant.

Kamraj Nayagam (Rohan Arasoo Jeyabalah with him) (Kadir, Andri & Partners) for the respondent.

Mary Lim J:

[1] There are two applications before the court: encls (1) and (6). Enclosure (1) is the plaintiff's application for an injunction to restrain the defendant from demanding and/or realising the bank guarantee that the plaintiff provided under the contractual arrangements between itself and the defendant. Enclosure (6) is the defendant's application for a stay of the present proceedings pending arbitration.

[2] As a result of the unfolding, development and intervening events in respect of these proceedings which are well recorded, and more particularly

JOBNAME: No Job Name PAGE: 5 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

with the consent of the parties to treat encl (1) as an application under s 11 of the Arbitration Act 2005 (Act 646); and encl (6) for stay under s 10 of the same Act; accordingly encl (1) will be treated as an application for an interim injunction pending arbitration under s 11 of the Act 646. Further, it is recorded that the parties are in agreement that the substantive merits of the dispute between them should be referred to arbitration. In fact, arbitration has already been initiated by the plaintiff through its letter sent just today to the defendant for this purpose.

[3] The parties have filed affidavits and affidavits in reply in respect of both applications.

FACTUAL BACKGROUND

[4] On 27 December 2012, the plaintiff and the defendant entered into a contract wherein the defendant appointed the plaintiff as a contractor to execute works for a project known as 'The Proposed Construction and Completion of Two (2) Nos of Research and Development (R&D) Buildings at Universiti Teknologi Petronas, Bandar Seri Iskandar, Perak Darul Ridzuan (Package 3C) (Contract No ITPSB/RD/12/02)' for RM74m ('the project). As required under the terms of this contract, the plaintiff provided a bank guarantee for the sum of RM3.7m issued by United Overseas Bank (M) Bhd.

[5] The defendant appointed one Encik Hilme Hassan from KLCC Projeks Services Sdn Bhd as the 'employer's representative'. He, together with other consultants of the defendant was the defendant's representatives in the project.

[6] The plaintiff alleged that from the early days of execution of the contract, the defendant breached the contract through its representatives' 'misconduct and antagonising treatment' of the plaintiff. Such 'misconduct and antagonising treatment' were alleged to be 'unprofessional, impulsive, arbitrary, wrongful, unlawful and/or without proper or reasonable cause', for the purpose of harassing and threatening the plaintiff; and to frustrate the plaintiff's efforts in relation to the execution of the contract.

[7] Zainol bin Abdullah ('Zainol'), the plaintiff's managing director gave details of these allegations in his affidavit filed in support of the plaintiff's application (encl 2). They included allegations of the defendant's interference with its subcontractors; matters relating to site clearance and removal of trees at the work site; changes in the platform level and the location of a borrow pit; construction of additional or temporary drains; as well as threats made during meetings between the parties; and 'requests for bribe' by one of the defendant's consultants.

JOBNAME: No Job Name PAGE: 6 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[8] For instance, Zainol explained how the defendant's representatives are said to have unnecessarily interviewed the plaintiff's subcontractors; and unreasonably rejected the workers of the plaintiff's subcontractors. According to Zainol, such actions jeopardised the execution of the works by the subcontractors who then had to take time to replace these 'rejected' workers.

[9] Zainol further explained how the defendant's requirement for additional work had also delayed the plaintiff's execution of the contract. This additional work which included the clearance of the work site, construction of two additional earth drains or change of the platform level, provision of a revised work program, were said to be either not within the plaintiff's scope of work; or there were no provisions for these items in the bills of quantities under the contract.

[10] Then, there is this allegation that one of the defendant's consultants had sought a bribe, termed as a 'cooperation fee', from the plaintiff. According to the plaintiff, this consultant had in clear and unambiguous terms informed the plaintiff that 'in the event we pay him the said 'cooperation fee', he will ensure that he will give his expeditious cooperation where it involves our work. On the other hand, in the event if we do not pay, he will deliberately antagonise us and create obstacles for our work'. The plaintiff alleged that such 'practice not only contradicts your esteemed company's impressive and lauded 'no gifts' pledge and Code of Conduct and Business Ethics ('CoBE') but it is also criminal'. The plaintiff did not make the payment. It sought legal advice.

[11] Upon legal advice, the plaintiff issued a letter dated 28 May 2013 to the defendant notifying the defendant of its intention to terminate the contract. In the letter, the plaintiff specifically informed the defendant that it construed the 'actions and conduct of your representative, namely employer's representative, Encik Hilme Hassan ('ER') and KLCC Projeks Services Sdn Bhd and its Consultants ('KPS')' 'as a fundamental breach of the Contract'; and gave details of those actions and conduct. The plaintiff treated the breach as a repudiation of the contract which it accepted. Following that, the plaintiff demobilised its labour, machinery and equipment etc from the work site while reserving its right to claim for any damage or loss arising from the circumstances.

[12] By letter dated 30 May 2013 (see exh ZA4), the plaintiff demanded the return of the original bank guarantee and further stated:

> Unless you confirm your undertaking to do so and not to demand the Guarantee for the same within 48 hours from the date of this letter, we will instruct our lawyers to compel the return and restrain the demand/payment of the Bank Guarantee.

JOBNAME: No Job Name PAGE: 7 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[13] In June 2013, the plaintiff submitted progress claims for work done to date (see exh ZA5). The defendant did not pay for any of the claims submitted.

[14] During that same month of June, the defendant sent its own set of letters to the plaintiff. These letters pertained to claims of delay in completion of various works. The plaintiff responded to these letters; the details however, are not relevant for our present purpose — (see exh ZA6).

[15] Then, on 1 July 2013, the defendant responded to the plaintiff's letter dated 28 May 2013 — (see exh ZA7). In this letter, the defendant informed the plaintiff that it did 'not accept any of the allegations made therein'; and inter alia added that 'even if taken as correct (which is denied), could give you no more than a right to compensation under the terms of the Contract, and clearly do not warrant your purported termination of the Contract.' It then informed the plaintiff that the plaintiff's 'purported termination of the Contract is in fact a repudiation of your obligations thereunder. There can be no question of your 'handing over' partially completed works as suggested by Paragraph 26 of your letter, and we expect you to fulfil all your contractual obligations.'

[16] In a separate letter dated 11 July 2013, the defendant, through its employer's representative issued a notice to remedy default on the plaintiff pursuant to cl 58.1 of the contract — (see exh ZA8). The plaintiff was given 15 days to remedy the defaults identified, that is:

(a) you have without reasonable cause suspends the carrying out of the works before final completion; and/or

(b) you have failed to proceed regularly and diligently with the works; and

(c) you have failed to execute the works in accordance with the contract or neglects to carry out your obligations under this contract.

[17] The plaintiff denied these allegations through its letter dated 24 July 2013 — (see exh ZA8).

[18] On 1 August 2013, the defendant terminated the contract by reason of the plaintiff's failure to remedy the default identified in its earlier letter dated 11 July 2013 — (see exh ZA9). The plaintiff denied and disputed the termination vide its letter dated 5 August 2013 — see also exh ZA9.

[19] On the same date, the defendant called on the bank guarantee causing the plaintiff to approach the court for an interim injunction which was subsequently agreed to be treated as an interim injunction under s 11 of the Arbitration Act 2005 (Act 646). The defendant, in turn, filed an application to stay the present proceedings pending arbitration.

JOBNAME: No Job Name PAGE: 8 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

THE PLAINTIFF'S CONTENTIONS

[20] In a nutshell, learned counsel for the plaintiff contended that the plaintiff's complaints were all about how unreasonable and difficult it was for the plaintiff to work with the defendant's employer's representative. The plaintiff alleged that the impediments or 'antagonising treatment' faced by the plaintiff arose quite early; as early as five months into the contract. The plaintiff alleged that there was a pattern to these impediments making it unbearable for the plaintiff to carry on. The plaintiff construed these actions and conduct of the defendant as amounting to a fundamental breach and repudiation of the contract which was accepted by the plaintiff.

[21] In a supplementary affidavit affirmed by one Chua Teik Hin ('Chua'), one of the plaintiff's directors, details of the bribe were provided (encl 11).

[22] At para 5, Chua said that the person who asked for the bribe was a person by the name of 'Eddie Ng who introduced himself as a director of Meinhardt. Meinhardt is the consulting engineer in respect of the Civil & Structural part of the works ('C&S') engaged by the Employer.' At para 6 of his affidavit, Chua said that 'Sometime when the Site Memo dated 13.3.2013 ... was issued and during a meeting with the Employer's Representatives, the plaintiff was told to refer and consult the personnel at Meinhardt as they were the consulting engineer responsible for the said Site Memo.'

[23] Chua then called this Eddie Ng and a meeting was arranged for 18 March 2013. It was at this meeting that:

> 13. Eddie Ng then expressly asked to be paid 2% of the C&S Works under the plaintiff's Contract Sum which is under his area of works/consultation as 'cooperation fee'.
>
> 14. He then offered to take a round up figure of RM300,000.00.
>
> 15. In addition, Eddie Ng also wanted to be paid based on the ratio of between '3.7' to '4:6' between himself and the plaintiff for savings on alternative/counter proposals on piling and structural works of the plaintiff's Works.
>
> 16. In this regard, Eddie Ng said:
>
> (a) he will offer to come up with the design of a counter or alternative proposal for some of the piling and structural Scope of Works for the plaintiff to submit to himself/Meinhardt;
>
> (b) he will then approve the same; and
>
> (c) the savings from counter proposal will be distributed between himself and the plaintiff in the above said ratio of between '3:7' and '4:6'.

JOBNAME: No Job Name PAGE: 9 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

17. Eddie Ng also said that he can assist the plaintiff with other trades of the plaintiff's Scope of Works and to 'connect the plaintiff with consultants from other trades on similar cooperation fees and/or counter proposals, if the plaintiff wanted.

18. I then attempted to deflect the issue and asked Eddie Ng whether we can first discuss about the problems the plaintiff was facing on Site with respect to Meinhardt's said Site Memo dated 13.3.2013 which I said was more urgent and critical at that moment in time. I also said that I cannot make any decision on his request/proposal above as I needed to discuss with the plaintiff's Board of Directors. I then suggested that we meet next week to discuss about the cooperation fee.

19. Eddie Ng replied 'this problem (regarding Meinhardt's Site Memo dated 13.3.2013) can wait until next week.'

20. He also said that if his cooperation fee is not met, he may instruct the plaintiff to do more soil investigations and/or construct more earthdrains just to 'make your life difficult'.

B. Meeting on 25.3.2013

21. Eddie Ng and I met again on 25.3.2013 at the same venue as our first meeting

22. As a precaution, I brought along a voice recording device.

23. During this second meeting, Eddie Ng confirmed that the 'basic/basis' which he requested is 2% which is based on RM15 million, that is RM300.000.00

24. Eddie Ng said, inter alia, that:

(a) the 'cooperation fee' will make the plaintiff's job 'smooth on the site' and that the 'top people won't disturb';

(b) in respect to the counter proposals, he gave examples on how he can assist the plaintiff with the alternative such as on piling and on roof truss; and

(c) 'all the area you need help I try to help 100% whatever I can' and that 'we try to push everything on your favourite part what we have go through la but the objective is there'.

25. Based on the meetings with the defendant's Representatives/agents as stated above and/or the conduct in general of the defendant's Representatives/agents in respect of the project and/or the plaintiff's Works under the Contract, the plaintiff have strong reason to believe

(a) the defendant and/or its representatives, agents and/or otherwise has no intention to abide by and carry out the letter of the Contract;

(b) that the defendant and/or its representatives, agents and/or otherwise will continue their antagonising treatment towards the plaintiff unless and until the said 'cooperation fee' is paid; and

JOBNAME: No Job Name PAGE: 10 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

(c) that the incident above is not limited to just the C&S part of the plaintiff's Works and/or Meinhardt's consultants.

[24] In his affidavit, Chua also explained why he had not disclosed Eddie Ng's name earlier. According to him, 'there was no indication that the defendant was taking the plaintiff's plight seriously but only was interested in who this person was'. He further said:

> Even if the defendant took action against this Eddie Ng, 'based on the meetings above and the conduct of the Defendant's representatives/agents in respect of the project and/or the Plaintiff's Works under the Contract'; he believed that the 'antagonising treatments will still continue so long as the plaintiff is still on Site;'

[25] Chua also affirmed in his affidavit that the plaintiff was prepared to reveal Eddie Ng's name 'if the defendant will ensure that these unfair treatment would end. However, the defendant gave no such assurance but was only interested as to the identity of the person requesting for bribe from the plaintiff.' He also said that he was 'concerned for my well-being and safety, as well as my family's and my other director's family's, should anything untoward happened if I were to reveal such things'. Finally, it was a case of being left with the only choice of accepting the defendant's and/or the defendant's representatives/agents' conduct as a fundamental breach of the contract and as a repudiation of the same.

[26] Chua has since been lodged a complaint with the Malaysian Anti-Corruption Commission or MACC on this. A copy of his complaint is exhibited as 'CTH6' in the plaintiff's affidavit in reply No 2 (encl 20) while a copy of the recording of the conversation between him and Eddie Ng can be found in the plaintiff's supplementary affidavit No 2 (encl 13). The copy is in the form a compact disc marked as exh 'CTH4'. Chua subsequently had the recording of the conversation transcribed and translated into English by a qualified person. That transcript and translation is exhibited as 'CTH5' in the plaintiff's affidavit in reply No 2 (encl 20).

[27] Learned counsel contended that the timing of the call on the bank guarantee and all the events surrounding and leading to the termination of the contract causes concerns which amount to unconscionability. The events and matters that have been raised by the plaintiff 'prick the conscience of a reasonable and sensible man' and for which an injunction ought to be granted in the terms sought.

THE DEFENDANT'S RESPONSES

[28] Abdul Rahim bin Hj Hashim ('Abdul Rahim'), the managing director and chief executive officer of the defendant affirmed several affidavits. In his

JOBNAME: No Job Name PAGE: 11 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

first affidavit affirmed on 20 August 2013 (encl 8), amongst others, he stated that the defendant had fulfilled all its obligations pursuant to the terms and conditions of the contract; and that it was the plaintiff who was in fact in breach 'by failing to progress the works regularly and diligently'.

[29] He averred that the plaintiff 'as opposed to taking steps to accelerate the works then unilaterally decided to abandon the works which it was contractually obliged to carry out. The plaintiff had no contractual basis to unilaterally decide to not continue with the Contract.' He also averred that despite being issued a notice of default on 11 July 2013, the Plaintiff 'failed to take steps to remedy the acts of default on its part'.

[30] As for the various complaints alleged by the plaintiff, the defendant, inter alia, denied interfering in the plaintiff's contractual arrangements or rejecting any of its subcontractors without reasonable explanation. The defendant claimed that its actions were to 'ensure that the subcontractors appointed by the plaintiff were capable of completing the works within the required time frame to prevent any delay.' Similarly and in relation to the other complaints or allegations, the defendant stated that the allegations of threats made by the ER were untrue. Instead, the ER was just issuing instructions in accordance with the terms and conditions of the contract; that such instructions were early reminders to the plaintiff of the ER's concerns on the plaintiff's progress of the works that 'based on the current rate and progress of the works carried out by the Plaintiff, there would be significant delay in completion'; or 'necessary for instructions to be issued by the ER to the Plaintiff as there were delays in the progress of the works by the Plaintiff and as such, it was imperative that the necessary steps were taken by the Plaintiff to accelerate the works'; or because it was 'in order to mitigate delay and to accelerate the works'.

[31] In short, the defendant alleged that the plaintiff 'who was already in delay, simply wanted to exit the Contract as it knew that it was incapable of fulfilling its contractual obligations.' The defendant alleged that it was the plaintiff who had unilaterally abandoned the site and who was in 'fundamental breach of the terms and conditions of the Contract'. The defendant further referred to the plaintiff's failure to remedy the defaults identified in its notice to remedy which failure caused the defendant to terminate the contract. Thereupon, relying on cl 8 of the contract, the defendant demanded on the performance guarantee. Under such circumstances, the defendant claimed that it was not unconscionable for the defendant to have demanded on the performance guarantee.

[32] As for the allegation of bribery, that was denied. According to the defendant, it had 'taken the Plaintiff's allegation of bribery as a matter of

JOBNAME: No Job Name PAGE: 12 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

utmost importance'. This was reflected in its meeting with the plaintiff on 6 June 2013 'to obtain clarification on this allegation. However, the plaintiff failed to provide the defendant with any details of this allegation which made it impossible for the defendant to carry out an investigation.'

[33] After the plaintiff (through Chua) had produced exh 'CTH4', the defendant filed a second affidavit in reply (encl 18) wherein Abdul Rahim, inter alia, said that the 'only issue discussed during the alleged conversation between Eddie Ng of Meinhardt and Chua as recorded in a CD ... relates to the issue of the platform level. However, this issue was resolved by the month of May 2013 following a series of discussions between the Plaintiff and the Defendant. This issue was resolved without any input of Meinhardt and this issue did not impact the progress of the works thereafter.' A copy of a letter from the plaintiff dated 3 May 2013 confirming this issue of the platform level was then exhibited.

[34] Aside from reiterating that it had taken the plaintiff's allegation of bribery seriously and that it had taken steps to make inquiries with all its consultants involved in the contract, Abdul Rahim also averred that the plaintiff's procedural route of raising this issue 'through Chua's 1st Affidavit is a blatant attempt to deflect from its acts of breaches'. He further stated that 'this issue of alleged bribery is irrelevant to the matter in hand which is the plaintiff's unreasonable conduct of unilaterally abandoning the project site which clearly justifies the defendant taking steps to encash the bank guarantee.'

[35] Abdul Rahim further averred at para 9 that:

> ... The matters deposed to at paragraphs 8 to 24 of Chua's 1st Affidavit amount to allegations against one individual out of the many persons concerned with the contract between the parties.

[36] At para 11, Abdul Rahim also said:

> ... that the contents of Paragraph 27 of Chua's 1st Affidavit reveal the plaintiff's true position, namely that the allegation of corruption is merely ancillary to the plaintiff's real problem, which is that it is was unable or unwilling to fulfil its contractual obligations, and was accordingly looking for a way to avoid the said obligations.

[37] After Chua had furnished the transcript and translation as appearing in exh 'CTH5', Abdul Rahim filed affidavit in reply 3 (encl 21). Again, he repeated that the defendant had 'no knowledge of 'co-operation fees' being charged by its consultants, much less bribes being sought. Such fees and/or bribes are contrary to the Defendant's stated policies'. He reiterated that the 'Defendant has investigated all such allegations and will continue to do so.'

JOBNAME: No Job Name PAGE: 13 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[38] Abdul Rahim added that there was 'no suggestion from the taped conversation or in the Plaintiff's affidavit that Eddie Ng purported to be acting in the interests of the Defendant.' He also denied that Eddie Ng had the power to stop the plaintiff's works. Instead, the 'works proceeded slowly because of the Plaintiff's own default.'

[39] In addition to Abdul Rahim's affidavits, Ir Dr Lim Boon Tiong, the Managing Director of Meinhardt (M) Sdn Bhd also filed an affidavit on behalf of the defendant (encl 19). In his affidavit, Dr Lim confirmed that 'Eddie Ng was a director of Meinhardt at the time of the events alleged in Chua's affidavit and he was the project Director and the Professional Engineer for Plans Submission to the relevant authority in the team from Meinhardt that was involved in the contract between the Plaintiff and the Defendant.' Upon being notified of the alleged bribery, 'Meinhardt made inquiries with the project team, including Eddie Ng. All of the project team including Eddie Ng stated that they knew nothing about this allegation.'

[40] However, once Chua produced the CD, 'Meinhardt again made inquiries with Eddie Ng who admitted meeting the plaintiff's representative and stated that the plaintiff's representative wanted to discuss how to resolve the delay of the project. Eddie Ng was reminded that it was not proper protocol for him to meet the plaintiff directly without the knowledge of Meinhardt, the Employer or the other Members of the consultancy team and that he had put Meinhardt in a bad light. He then offered his immediate resignation on 3 October 2013, and he officially left Meinhardt's employment on 8 October 2013.' Ir Dr Lim confirmed that 'Meinhardt had reviewed its records which confirm that no payment whatsoever was received by Meinhardt from Chua or the Plaintiff in relation to the contract between the plaintiff and the Defendant.'

[41] It is the defendant's argument that the plaintiff will not suffer any losses which cannot be compensated by damages. Since the defendant was itself applying for a stay so that all disputes and differences between the parties be referred to arbitration, the plaintiff's rights under the contract are said to 'remain protected wherein if the Plaintiff succeeds in the arbitration, the Plaintiff will be able to recover any monies which the arbitrator deems payable by the Defendant to the Plaintiff.' The balance of convenience is therefore said to lie in the defendant's favour.

[42] It is also the defendant's submission that a very clear case must be made out before the injunction may be granted. Since most of the plaintiff's allegations concern 'run-of-the-mill commercial disputes' with the only allegation which might shock the conscience is that of bribery, the defendant contended that the injunction cannot lie. Further, it was contended that the

JOBNAME: No Job Name PAGE: 14 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

injunction cannot be granted because 'there can be no allegation of unconscionable conduct on the part of the defendant'.

[43] Learned counsel for the defendant also submitted that the plaintiff's conduct was 'not one that is expected of persons of whom a bribe is solicited, ie to refuse to cooperate, and report the request to the relevant authorities and other concerned parties'. According to the defendant, the plaintiff ought not have mounted a 'sting' or used an 'agent provocateur' with surreptitious recording of the conversation with Eddie Ng.

[44] Further, the defendant contended that the failure of the plaintiff to immediately reveal the information pertaining to the identity of Eddie Ng, but kept it, seemingly as some sort of 'insurance', now amounted to asking the court 'to condone this behaviour by granting an injunction'. Finally, it was submitted that the defendant had done all that was reasonably expected in the circumstances, that 'it cannot be said that the defendant could do anything more.' Under such conditions, the call was therefore justified.

DETERMINATION OF THE COURT

[45] As pointed out earlier, the plaintiff has initiated arbitration just this day by letter to the defendant. Although given from the Bar, the defendant's solicitors have accepted this to be the position; the letter invoking arbitration or referring the dispute or difference between the parties to arbitration has been served on the solicitors for the defendant. However, learned counsel for the defendant is unsure if his client has been served. Be that as it may, it is agreed that the substantive dispute or differences between the parties are to be resolved by way of arbitration.

[46] With that state of things, the defendant's application for stay under s 10 of the Arbitration Act 2005 is really not contestable; and the plaintiff is only too happy to go to arbitration. Insofar as the application for an interim injunction is concerned, it cannot be denied that such an application may still be made even if the parties are in agreement that the disputes or differences between them be referred to arbitration. This is because of the clear terms in s 11 of the Act 646 which provides as follow:

> Arbitration agreement and interim measures by High Court
>
> 11 (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:
>
> (a) security for costs;
>
> (b) discovery of documents and interrogatories;
>
> (c) giving of evidence by affidavit;

JOBNAME: No Job Name PAGE: 15 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

(d) appointment of a receiver;

(e) securing the amount in dispute, whether by way of arrest of property or bail or other security to the admiralty jurisdiction of the High Court;

(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(h) an interim injunction or any other interim measure.

[47] The only issue is whether the plaintiff's application for an injunction in the terms spelt out ought to be granted as an interim measure pending arbitration. Upon consideration of the evidence before me and after hearing both counsel, I granted the orders sought. These are my reasons.

[48] First and foremost, these are the essential terms of the bank guarantee in question:

(a) this Agreement is supplemental to a Contract ...

(b) the Guarantor has agreed to guarantee the due performance of the said Contract in the manner hereinafter appearing.

Now the Guarantor hereby agrees with the Employer as follows:

(a) (Pursuant to Clause 8.1.1 of the Contract)

If the Contractor shall in any respect neglect, omit or fail to execute the Contract or commit any breach of the obligations thereunder then the Guarantor shall within forty eight (48) hours pay unconditionally on demand without proof or conditions upon receipt of the said demand to the Employer up to and not exceeding the sum of Ringgit Malaysia Three Million And Seven Hundred Thousand Only (RM3,700,000.00) representing five percent (5%) of the original Contract Sum or such part thereof notwithstanding any contestation, arbitration, legal proceedings or protest by the Contractor or by the Guarantor or by any other third party.

This Guarantee is a continuing security and shall be irrevocable and remain valid and effective from ...

[49] Bank guarantees such as that presented here, are in substance and effect, performance bonds intended to secure performance of the underlying contract between the parties. These guarantees and bonds are also in essence, on demand irrevocable and unconditional contractual obligations. For that reason, such guarantees or bonds are said to enjoy 'a bias or (rebuttable) presumption in favour of construction which holds a performance bond to be conditioned upon documents rather than facts' as opined by Staughton LJ in *IE Contractors Ltd v Lloyd's Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496. This 'bias' has therefore seen a more restrained exercise of discretion where

JOBNAME: No Job Name PAGE: 16 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

the court has been invited to grant injunctive reliefs concerning such guarantees or bonds.

[50] This approach, which may be described as strict, was earlier favoured by Kerr J in *Harbottle v National Westminster Bank* [1978] QB 146, and by Sir John Donaldson MR in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159.

[51] In *Harbottle*, Kerr J said:

> It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with the difficulties to enforce such claims; these are risks which the merchants take.

[52] Speaking for the Court of Appeal in *Edward Owen Engineering Ltd*, Sir John Donaldson MR had said:

> (a) In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of the unique characteristic. If, save in the most exceptional cases, he is to be allowed to derogate from the bank's personal and irrevocable undertaking, given be it again noted at his request, by obtaining an injunction restraining the bank from honouring that undertaking, he will undermine what is the bank's greatest asset, however large and rich it may be, namely its reputation for financial and contractual probity.
>
> (b) The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge.

[53] This approach has been adopted on both sides of the Causeway. In *Bocotra Construction Pte Ltd & Ors v Attorney General (No 2)* [1995] 2 SLR 733, the Singapore Court of Appeal applied Staughton LJ's views in *IE Contractors Ltd*, and added:

> In the case of unconditional bonds, this would simply require the making of a written demand rather than proof of the facts, for example, of default or failure to perform. Ultimately, this raises a question of construction, and of examining the intent of the document.

[54] At home, this position was approved by the Federal Court in *Sumatec*

JOBNAME: No Job Name PAGE: 17 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1.

[55] Further, when dealing with such bank guarantees and performance bonds, one needs to be mindful as to whether the application for an injunctive relief is as against the issuing bank or, against the beneficiary of the guarantee or bond. As against the issuer or bank, that agreement is quite separate from the underlying contract between the parties. In those circumstances, it is not open to the court to examine into the question of breach or otherwise of the underlying contract. The bank is obliged to pay the beneficiary without proof or conditions. This is despite protests or objections from any party. Hence, the remarks made by Staughton LJ. As decided by the Supreme Court in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, the 'real issue was one of contractual interpretation of the performance bond and not of the nature of the transaction'. Karthigesu JA in *Bocotra Construction Pte Ltd* was of the view that this was the 'correct approach'.

[56] As against the beneficiary, the underlying contract will come under scrutiny and there may well be cogent reasons or what was described by the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd v Nam Fatt Construction Sdn Bhd* [2011] 7 CLJ 442, at p 470 as 'good grounds between the parties for injunction to apply ... ' This decision of the Court of Appeal was implicitly affirmed by the Federal Court recently in *Sumatec Engineering and Construction Sdn Bhd.*

[57] Nevertheless, it would appear that in either set of circumstances, whether the injunctive relief is sought against the issuer or bank; or against the beneficiary of the guarantee or bond; such relief is available upon proof of the presence of fraud or unconscionability. This was recognised by both the Federal Court in *Sumatec Engineering and Construction Sdn Bhd* and the Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd*. Most importantly, the Federal Court's decision put to rest the argument on whether the ground of unconscionability was a distinct and separate or additional ground from fraud. Hitherto, the arguments and persuasions were to confine the availability of injunctive relief only to cases where fraud was proved.

[58] Abdull Hamid Embong FCJ, speaking for the Federal Court said:

> [25] Unconscionability as an added and distinct exception to restrain payments in on demand guarantees has lately made some inroads into some common law jurisdictions. Thus in Singapore some authorities, notably Bocotra unconscionability was introduced seemingly as an additional ground for restraining a call or payment on a bank guarantee although the concept was not accorded a full discussion here.

JOBNAME: No Job Name PAGE: 18 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[59] His Lordship observed that the Singapore Court of Appeal then 'took a forward leap in holding that unconscionability alone could constitute a ground for restraining a call for payment under a performance bond and that Bocotra had been a conscious departure from the English position.' Unconscionability has thus found sound footing as a distinct exception in Singapore' in the case of *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 4 SLR 604.

[60] After examining the position in Malaysia, His Lordship opined:

> [33] It would seem from the modern authorities we have read, that in the case of on demand letters of guarantee or performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionabilty as a separate and independent ground to allow for restraining order on the beneficiary.
>
> [34] The rationale for embracing this equitable exception can be seen from this passage of the Australian High Court decision in *Stern v McArthur* (1988) 165 CLR 489, where it was said:
>
> > The general underlying notion is that which has long been identified as underlying much of equity's traditional jurisdiction to grant relief against unconscientious conduct, namely, that a person should not be permitted to use or insist upon his legal rights to take advantage of another's special vulnerability or misadventure for unjust enrichment of himself...

[61] After the close of submissions, the Federal Court in that case was served with additional submissions citing the Court of Appeal's decision in *Kejuruteraan Bintai Kindenko Sdn Bhd*. Upon scrutinising the decision, the Federal Court expressed that it was also 'inclined to agree wholly with the principles enunciated by the Court' that 'the principle recognising unconscionability as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense'.

[62] Having established that unconscionability is a valid ground upon which an injunctive order may be available, the next issue is to determine the applicable test. This very issue was addressed by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd*. According to the Federal Court, the 'seriously arguable and realistic inference test' as expressed in *Focal Asia Sdn Bhd & Anor v Raja Noraini bt Raja Datuk Nong Chik & Anor* [2009] MLJU 1688; [2009] 1 LNS 913 'is equally applicable to the extended exception of unconscionability'.

[63] In *Focal Asia*'s case, Mohamad Ariff J (as he then was) said:

> If there is clear evidence of fraud in the underlying contract, or unconscionability, the Court will interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly

JOBNAME: No Job Name PAGE: 19 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application such as the present.

[64] The Court of Appeal in *Kejuruteraan Bintai Kindenko Sdn Bhd* had also agreed with this same test as suggested by the learned High Court; and that is:

... the plaintiff has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of fraud or unconscionability which would basically mean establishing a strong prima facie case, at least at the interlocutory stage. The plaintiff has to place sufficient evidence before the Court so as to enable the Court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionablity' being committed by the beneficiary has been established to an extent sufficient for the Court to be minded to order the injunction sought. This additional ground should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man.

[65] The court was of the view that 'there must be placed before the Court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare statement.' Her Ladyship, Zainun Ali JCA (as she then was) in *Kejuruteraan Bintai Kindenko Sdn Bhd* explained that:

[4] ... unconscionability is a doctrine which allows the courts to deny enforcement of a contract because of abuses arising out of the contract.

[5] In my view the principle underlying the unconscionability doctrine is the prevention of oppression and unfair conduct and because the determination of unconscionability is fact specific, courts must consider such a claim on a case by case basis and assess the totality of the circumstances.

[66] In the present case, the parties are not in fact in dispute over these principles which I have set out. Their disagreement is in the application of those principles to the facts presented.

[67] On my part, a full and proper evaluation of the relevant facts and circumstances surrounding the call or demand on the bank guarantee by the defendant is warranted. This is because the allegation of unconscionability is fact specific or fact sensitive, to be decided on a case by case basis. Having done that, I am satisfied that there is indeed placed before the court more than sufficient 'manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare statement'.

JOBNAME: No Job Name PAGE: 20 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[68] For a start, I agree with the defendant that the plaintiff's complaints on matters such as site possession, the construction of borrow pit, drains, employment of the subcontractors and the like, are matters which are properly for resolution by arbitration. While that may be so, these matters nevertheless need to be set out so as to provide not just some backdrop but to assist in a fuller and better appreciation of the plaintiff's allegation of unconsionability in the circumstances of the defendant's demand on the bank guarantee. It must be stressed that by no means is the court determining the truth of those complaints or their implications in relation to the parties' respective obligations under the contract. That remains a matter for resolution by arbitration.

[69] As I understand the plaintiff's case, it claims that in the course of the execution of the works, it had faced innumerable impediments from the defendant's representatives that were unreasonable; and that it had received harassing or 'antagonising treatment' from these representatives. It claimed that there was a 'pattern' to these impediments and treatment which made it difficult and unbearable for the plaintiff to continue to work with the defendant. It further claimed that such impediments and treatment was because the plaintiff had refused to accede to one of the defendant's representatives' request for a bribe 'in exchange for their cooperation or fair treatment'. The plaintiff construed these impediments or actions and conduct of the defendant as a fundamental breach and repudiation of the contract which it then proceeded to accept.

[70] The critical allegations therefore are those pertaining to the 'cooperation fee'. The court will have to determine whether that incident ever took place; whether the plaintiff's complaints of impediments, harassment or problems and difficulties encountered in the course of the execution and implementation of the contract was in anyway related or affected by this incident; and whether the defendant's demand on the bank guarantee was thereby unconscionable in the circumstances. Or, whether the defendant always retained the right to call on the bank guarantee regardless of the truth of these allegations.

[71] From the affidavits and reply affidavits filed, it can be deduced at the very least, the following, that:

(a) the incident of the bribe as alleged by the plaintiff did in fact take place;

(b) the incident took place on 18 March 2013 and 25 March 2013;

(c) the authenticity of the transcript and translation of the conversation between Eddie Ng and Chua is not challenged;

(d) there were differences between the parties in relation to various matters identified by the plaintiff; and

JOBNAME: No Job Name PAGE: 21 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

(e) both parties terminated the contract.

[72] From these same conclusions, it is right to say that the persons and entities identified and named by the plaintiff are not fictitious or bear fictitious names. These persons were further involved in some way or another and to varying extents in the works under the contract. These persons included the defendant's various consultants as well as its representative in relation to the project (employer's representative). In particular, Meinhardt is indeed one of the defendant's consultants in the project. And, amongst Meinhardt's employees is this Eddie Ng, who is said to have sought the 'cooperation fee'. Significantly, Eddie Ng and Meinhardt for that matter were the consulting engineers responsible for the Civil and Structural (C&S) Works under the contract between the plaintiff and the defendant. Eddie Ng was not a mere employee of Meinhardt at the material time, but one of its directors holding the portfolio of project director and the professional engineer for plans submission to the relevant authority. Undeniably, this is a key responsibility in any project; the present is not an exception.

[73] The matter of the bribe took place at the two meetings between Eddie Ng and Chua; on 18 and 25 April 2013. This is how and why those two meetings came to pass.

[74] The plaintiff had been issued a site memo dated 13 March 2013 by Meinhardt. In this site memo, Meinhardt had instructed the plaintiff 'to construct two additional earth drains at the depth of 2.0 m running through the site within the building area' — see appendix 22 to exh ZA3 in encl 2. The plaintiff disagreed or was not happy with this instruction and it took this up with the employer's representative at one of its meetings. There, the plaintiff was 'told to refer and consult the personnel at Meinhardt as they were the consulting engineer responsible for the said Site Memo'. Chua deposed that he called Eddie Ng and a meeting was arranged for 18 March 2013 at The Gardens Hotel & Residences in Kuala Lumpur.

[75] Now, what exactly is this Eddie Ng supposed to have sought?

[76] As pointed out, the authenticity of the translation and the transcript of the meeting between Eddie Ng and Chua of the plaintiff are not challenged. According to the plaintiff, at that meeting, Eddie Ng had 'identified that the Plaintiff's scope of Works under the Contract which is his area of works/consultation is around the region of RM15–16m of the Plaintiff's Contract sum.' Eddie Ng is said to have then 'expressly asked to be paid 2% of the C&S Works under the Plaintiff's Contract Sum which is under his area of works/consultation as 'cooperation fee'. This sum was then unilaterally rounded up by Eddie Ng to RM300,000.

JOBNAME: No Job Name PAGE: 22 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[77] Eddie Ng is said to have 'also wanted to be paid based on the ratio of between '3.7' to '4:6' between himself and the plaintiff for savings on alternative/counter proposals on piling and structural works of the plaintiff's Works'. In this regard, Eddie Ng said:

(a) he will offer to come up with the design of a counter or alternative proposal for some of the piling and structural scope of works for the plaintiff to submit to himself/Meinhardt;

(b) he will then approve the same; and

(c) the savings from counter proposal will be distributed between himself and the plaintiff in the above said ratio of between '3.7' and '4:6'.

[78] In this same incident, Eddie Ng is alleged to have also said that 'he can assist the Plaintiff with other trades of the Plaintiff's Scope of Works' and to 'connect the Plaintiff with consultants from other trades on similar cooperation fees and/or counter proposals, if the Plaintiff wanted.' Eddie Ng also indicated that 'if his cooperation fee is not met, he may instruct the plaintiff to do more soil investigations and/or construct more earthdrains just to 'make your life difficult'.

[79] From the record before the court, it can be concluded that the plaintiff was having differences or problems with the defendant's representatives. Whether these differences or problems were of its own making or of the representatives; or a combination of the two is to me, irrelevant for our purpose. What is relevant is the existence of these differences or problems.

[80] And, the records show that these differences include differences over the construction of additional earth drains, site clearance and other earthworks issues. These matters fall well within the scope of responsibility of Meinhardt and/or Eddie Ng. In fact, the evidence show that Eddie Ng had been copied in on the related correspondence. This adds credibility and plausibility to the plaintiff's allegations and concerns of problems or impediments encountered throughout the execution of the contract.

[81] Next, it is observed that the plaintiff's allegations or concerns were not raised just before the filing of the present proceedings. These complaints which arose early in the contract had been brought to the defendant's attention in the plaintiff's letter dated 28 May 2013. At paras H and I, this is what the plaintiff said:

H. Request for bribe

22 During a meeting with one of your consultant, he had in clear and unambiguous terms requested that we pay what he coined as 'cooperation fee' to

JOBNAME: No Job Name PAGE: 23 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

him. He indicated in clear and unambiguous terms that in the event we pay him the said cooperation fee, he will ensure that he will give his expeditious cooperation where it involves our work. On the other hand, in the event if we do not pay, he will deliberately antagonise us and create obstacles for our work.

23 Such practice not only contradicts your esteemed company's impressive and lauded 'no gifts' pledge and Code of Conduct and Business Ethics (CoBE) but is also criminal in nature.

I. Fundamental Breach

24 In the light of the request for bribe, there is compelling evidence to believe that the overall misconduct and antagonising treatment by the KPS (or any part of the consultant team) on us and our employees and subcontractors was motivated to obtain a bribe in exchange for their cooperation or fair treatment. There is also compelling reason to believe that this harassing treatment will continue unless and until such 'demands' are met.

[82] The letter was copied to the defendant's representatives, Encik Hilme bin Hassan and Pn Ir Hashimah Hashim. Following this letter, the plaintiff asked for the return of the original bank guarantee by letter dated 30 May 2013 and on 3 June 2013, submitted its progress claim. The defendant did not respond to any of these letters immediately which it had received. Instead, what the defendant set about to do next is where the allegation of unconscionability takes root.

[83] The defendant, through its representatives sent a flurry of letters relating to the plaintiff's progress or lack of progress of work. By letters dated 6 June 2013, 7 June 2013, 10 June 2013, 12 June 2013, 13 June 2013, 21 June 2013, 23 June 2013, 25 June 2013, 26 June 2013, 28 June 2013, 3.7.2013, the defendant raised matters on 'delay in completion of earthworks'; non-signing of the formal contract document; site management and site supervision issues, and outstanding works. In short, the defendant claimed that there was delay in the plaintiff's progress of the works. Some of these letters were either copied to Encik Hilme bin Hassan or were written by Encik Hilme bin Hassan himself.

[84] On its part, the plaintiff replied to each of these letters; and sought payment on its progress claim — see letters dated 10 June 2013, 13 June 2013, 14 June 2013, 18 June 2013, 19 June 2013, 27 June 2013 (three letters of even date touching on delay of earthwork and overall progress of the works; work program and weekly progress report; and demobilisation of earthwork machinery).

[85] In none of these letters did the defendant challenge the plaintiff's notice of termination of contract as set out in its letter dated 28 May 2013. On the contrary, there was no reference whatsoever to that letter.

JOBNAME: No Job Name PAGE: 24 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[86] It was not till 1 July 2013 that the defendant, through Rahim, responded to the plaintiff's notice of termination as contained in its letter of 28 May 2013. In this letter, it placed 'on record that we do not accept any of the allegations therein' and then proceeded to address the matters alleged. Specifically, the defendant stated:

> As regards the matters complained of at items A to G of your letter, these are clearly matters which fail to be resolved in the ordinary course of business between yourselves and the project consultants. We must also note that your allegations, even if taken as correct (which is denied), could give you no more than a right to compensation under the terms of the Contract, and clearly do not warrant your purported termination of the Contract.
>
> As regards the matters complained of at items H and I of your letter, we have, in accordance with our stated company policies, taken such complaints as matters of utmost import. As such, we have on 6 June 2013 met with you (in the person of Dato' Zainal bin Abdullah and En. Chua Teik Hin) to clarify your allegations. Regrettably, you have failed and/or refused to give any details of your allegations. We note that this:
>
> (a) Makes it impossible for us to adequately follow up on your allegations;
>
> (b) Renders your suggestion of a 'Fundamental Breach' clearly unsustainable.
>
> As such, your purported termination of the Contract is in fact a repudiation of your obligations thereunder. There can be no question of your 'handing over' partially completed works as suggested by Paragraph 26 of your letter, and we expect you to fulfil all your contractual obligations.

[87] Subsequently, by letter dated 11 July 2013, the defendant issued a notice to remedy default pursuant to cl 58.1 of the conditions of main contract. In this notice, the defendant alluded to all its earlier notices of delay and stated that 'in light of all your actions, omission, failures, neglects, defaults, we have determined that you have, under cl 58.1 of the conditions of main contract, committed default in' three respects which were then set out; and the plaintiff was given 15 days to remedy the alleged default.

[88] The plaintiff responded vide its letters dated 19 July 2013 and 24 July 2013. In the latter letter, the plaintiff denied the defendant's allegations and pointed out that it had replied to each of the defendant's letters.

[89] What followed next was the defendant's letter dated 29 July 2013 where, amongst others, and in relation to the plaintiff's 'alleged notice of termination', it said that it was 'at liberty to ignore your said termination notice which was not issued properly under the terms of the contract and in any event issued for a collateral purpose and without any justification'. On 1 August 2013, the defendant terminated the contract. On the same date, it called on the bank guarantee.

JOBNAME: No Job Name PAGE: 25 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

[90] From this chronology of the material events and the contents of the numerous letters exchanged between the parties, I do not agree with the defendant's submission that the plaintiff was simply keeping the matter of the bribe 'to be used for a rainy day'. Instead, I find the defendant's call on the guarantee somewhat disconcerting, inappropriate and improper such as to render the circumstances of the call unconscionable. The chronology of events revealed that it was actually the defendant who chose not to reply to the plaintiff's letter of termination and instead, set about preparing a case and thereby provide justification for its subsequent call on the bank guarantee.

[91] While the defendant may have felt it 'impossible ... to adequately follow-up on your allegations' as both Chua and Zainol had 'failed and/or refused to give details of your allegations', there was also no suggestion by the defendant that the plaintiff's failure or refusal was unreasonable. Given that the allegation is serious and far-reaching, it would fair and reasonable to expect some effort on the part of the defendant to allay any concerns the plaintiff, in the persons of Chua and Zainol, may have had in providing the requisite details.

[92] According to Chua, the plaintiff was prepared to reveal Eddie Ng's name 'if the Defendant will ensure that these unfair treatment would end'. But, because the defendant did not give such assurance but was only interested on the identity of the person requesting for the bribe, coupled with Chua's concerns for his 'well-being and safety, as well as my family's and my other director's family's, should anything untoward happened if I were to reveal such things', the details were not forthcoming. There is no evidence whatsoever of the defendant attempting in any measure, large or small, to work with the plaintiff in getting to the root of the plaintiff's problems. Upon learning of the plaintiff's termination of the contract and its reasons for doing so, the defendant instead commenced a course of conduct which then afforded or availed the defendant the opportunity of ultimately, calling on the bank guarantee. This course of conduct and the various actions taken by the defendant lent weight to the plaintiff's contention that it was unconscionable for the defendant to have called upon the bank guarantee in the circumstances of the case.

[93] Following its meeting with Chua and Zainol, the defendant ought to have responded to the plaintiff's letter of 28 May 2013. Instead, as mentioned, it commenced a series of actions reflected in its various letters which culminated in its letter of termination. It is that series of action which provided or gave the defendant a basis or a right which it would otherwise not have, to call on the bank guarantee. The defendant pointed out various defaults and

JOBNAME: No Job Name PAGE: 26 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

finally issued a notice to remedy default which when the plaintiff did not remedy gave the defendant an option to terminate the contract, which it promptly did.

[94] In view of the defendant's awareness of the bribe, greater effort should have been expanded, including some effort in allaying Chua's concerns. Prudence and caution ought to have been exercised. There should have been greater promptitude in responding to the plaintiff's allegations. Instead, it was more concerned with termination of the contract. I must add that it cannot be said for certain that the plaintiff's complaints of impediments, harassment or problems and difficulties encountered in the course of the execution and implementation of the contract was in no way related or affected by the incident over Eddie Ng.

[95] Further, the time lapse between the various events and given the insidious character of bribery, it is not unreasonable for the plaintiff to be cautious and concerned over its next course of conduct or action. On the other hand, upon being cloaked with knowledge of the circumstances, the defendant's course of conduct and actions suggest that it was the defendant who was building its case and justifications for a call on the bank guarantee.

[96] Given these overall circumstances, I find that there is this lingering doubt of the events, differences, and disputes between the parties; and the truth of the same. Although these events, differences and disputes form the subject matter of arbitration and are to be resolved by arbitration as to its merits, that lingering doubt is enough 'to prick the conscience of a reasonable and sensible man' as to the conscionability of the defendant's call on the bank guarantee.

[97] There is indeed 'placed before the Court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare statement.' The defendant's conduct post plaintiff's letter of termination of 28 May 2013 gives room for the allegation that it is unconscionable for the defendant to have made that call. The plaintiff has satisfied 'the threshold of a seriously arguable case that the only realistic inference is the existence of ... unconscionability which would basically mean establishing a strong prima facie case.'

[98] Under these conditions and circumstances, not only a strong prima facie case for injunction has been made out, the court is satisfied that this is an exceptional and suitable case for an injunction to be granted and the court is minded to so grant. In fact, justice mandates that an injunction be granted on prayers (2) and (5) pending arbitration together with costs of RM20,000 to the plaintiff. Accordingly, the injunction in the terms sought in prayers (2) and (5)

JOBNAME: No Job Name PAGE: 27 SESS: 3 OUTPUT: Wed Sep 24 11:52:24 2014

are granted. With the grant of the orders, encl (6) consequently must stand dismissed as the matter is indeed proceeding to arbitration.

Application allowed with costs.

Reported by Kanesh Sundrum